APPENDIX A.

Ninth Circuit Memorandum.

United States Court of Appeals for the Ninth Circuit.

Dorthea Nyberg, Trustee for Connie Louise Nyman and Larry Charles Nyman; Dorthea Nyberg, Executrix of the Estate of Lewis Marvin, Deceased; Dorthea Nyberg, Individually; Donald Nyberg, Individually; Margaret Harvin, Individually; Margaret Ellis, Individually; Fred Thomson, Co-Trustee; Inland Lumber Company Profit-Sharing Trust; and Lorraine K. White, Individually, Plaintiffs-Appellants, vs. Thomas E. Johnston; Shirley L. Johnston; Richard S. Hallmark; Vivian Hallmark; William T. O'Brien; Vista Del Verde, Inc.; Vista Del Verde Corporation; Condor International Corporation; Vista Del Verde Company, Robert J. Krause and Louis A. Krause, Defendants-Appellees. No. 81-5200. D.C. NO. CV 76-983-FW.

Filed: April 30, 1982.

Appeal from the United States District Court for the Central District of California. Honorable Francis Whelan, District Judge, Presiding.

Argued and Submitted March 1, 1982.

Before: WRIGHT, ALARCON, and REINHARDT, Circuit Judges.

Plaintiffs allege that Bauer and Webley (who are not parties to this appeal) induced them to invest in real estate developments controlled by appellees. These investments apparently soured, and the plaintiffs brought suit against Bauer, Webley, and the appellees alleging that they had violated various federal securities laws and regulations. The appellees (moving defendants) successfully moved for summary judgment. That judgment is the subject of this appeal.

A party is entitled to summary judgment where (1) there are no disputed issues of material fact, and (2) based upon the established facts, the moving party should prevail as a matter of law. *Pegasus Fund, Inc. v. Lararenta*, 617 F.2d 1335, 1339 (9th Cir. 1980); Fed. R. Civ. P. 56(c). Upon review, we must interpret the evidence in a manner most favorable to the plaintiff. *Gaines v. Houghton*, 645 F.2d 761, 769 (9th Cir. 1981). "Cases where intent [here, scienter] is a primary issue generally are inappropriate for summary judgment unless all reasonable inferences that could be drawn from the evidence defeat the plaintiff's claims." *Vaughan v. Teledyne, Inc.*, 628 F.2d 1214, 1220 (9th Cir. 1980), *citing Calnet Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 683-84 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976).

The plaintiffs sought to hold the moving defendants liable, as controlling persons, for the acts of Bauer and Webley under section 20(a) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78(t) (1981). That section states that:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally . . . unless the controlling person acted in good faith and did not directly or indirectly induce and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78(t)(a).

To prevail under this section, plaintiffs must prove that the acts of the controlled persons constituted a violation of securities law, and that defendants were controlling persons within the meaning of section 20(a). *Christoffel v. E.F. Hutton*, 588 F.2d 665, 667 (9th Cir. 1978). Here, plaintiffs did contend that Bauer's and Webley's acts violated SEC

rule 10b-5 (17 C.F.R. 240.10b-5). Defendants did not challenge that contention for purposes of the summary judgment motion and no issue is presented with respect to that contention. The plaintiffs also alleged that the moving defendants were controlling persons in regard to Bauer and Webley. In granting summary judgment the district court ruled that the plaintiffs had failed to raise a genuine issue of material fact as to whether: (1) the moving defendants were "control persons" within the meaning of section 20(a), and (2) they possessed the necessary element of intent in regard to Bauer's and Webley's actions.

In attempting to define "control" within the meaning of section 20(a), the focus has been on the ability, or potential ability, of an individual to influence or control the subordinate's activities. *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 890-91 (3d Cir. 1975). The SEC has defined control, in the context of its registration and reporting requirements, as meaning, "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405(f) (1979). This definition has been used in section 20(a) cases by other circuits. *See G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 957-58 (5th Cir. 1981); *Rochez Bros.*, 527 F.2d at 890-91. Our own circuit has ruled that control requires "only some indirect means of discipline or influence short of actual direction to hold a 'controlling person' liable." *Strong v. France*, 474 F.2d 747, 752 (9th Cir. 1973), quoting *Myrel v. Fields*, 386 F.2d 718, 738 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

It is undisputed that Webley was an employee of the moving defendants and that Bauer had a contractual relationship with them that covered his solicitation of investments. The moving defendants contend that Webley's ac-

tivities exceeded the scope of his employment and that Bauer was an independent contractor over whom they exercised no control. In his deposition Webley stated that his acts were within the scope of his employment and corporate authority. He also said that he aided the moving defendants in the execution of trust deeds and promissory notes that secured the plaintiff's investments. Reviewing the record on summary judgment, including the evidence and the inferences which may be drawn therefrom, we conclude that a genuine issue of material fact was raised as to whether moving defendants possessed the requisite power and authority to make them "controlling persons."

In *Christoffel v. E.F. Hutton*, 588 F.2d 665, we reviewed decisions of the Second and Third Circuits that required culpable participation in the securities violations before a defendant could be characterized as a controlling person. *Christoffel*, 588 F.2d at 668-69. In that case we found that the defendant did not participate in the alleged securities fraud and ruled that: "We need not decide in this case whether, like the Second and Third Circuits, we will require that the person who has participated in the acts of another must be "culpable." It is enough to dispose of this case to hold that Hutton can not be a "controlling person" . . . because it was not a participant. . . ." *Id.* at 669. It is far from clear that we would consider a showing of "culpability" a prerequisite to a determination that an individual or entity is a "controlling person." Under the statute, good faith is a defense, and that may be the appropriate context in which to consider matters relating to the controlling persons' culpability. However, since appellant's showing below met the stricter "culpability" standard, we need not decide whether it was necessary for it to do so.

We now turn to the evidence relating to the issue of whether moving defendants were culpable participants in

the alleged fraud. Krause's, Johnston's, and Hallmark's signatures appear on promissory notes and trust deeds that were issued as security for the plaintiffs' investments. The plaintiffs have argued that the security was worthless and that the providing of worthless security constituted a significant aspect of the alleged fraud. The trust deeds were on real property that was subject, at least in part, to a prior lien, and plaintiffs were not apprised of this fact. While the record is not entirely clear on this point, we cannot say at this point that plaintiff's contentions are erroneous or that they should be prohibited from attempting to prove their claim at trial. Viewing the evidence in the light most favorable to the plaintiffs, we conclude that a genuine issue of material fact exists as to whether the moving defendants were culpable participants in the alleged fraud.

In ruling on the section 20(a) claim, the district court stated that moving defendants "had no reasonable grounds for believing that fraudulent or unlawful activities were taking place. Absent scienter, moving defendants cannot be held liable as controlling persons. . . ." Memo of Decision p. 7. It is settled in this circuit that recklessness satisfies a scienter requirement. *Kiernan v. Homeland, Inc.*, 611 F.2d 785, 788 (9th Cir. 1980); *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir. 1978). Recklessness may be established by showing that defendants "had reasonable grounds to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts." *Kiernan*, 611 F.2d at 788. In summarizing the section 20(a) defense the Fifth Circuit has stated that:

> We hold therefore that the burden on the controlling person is to establish that he did not act recklessly in inducing, either by his action or inaction, the act or acts constituting the violation of 10b-5. Or, . . . the question is whether the defendant acted recklessly in

> failing to do what he could have done to prevent the violation.

G.A. Thompson Co. v. Partridge, 636 F.2d 945, 960 (5th Cir. 1981).

The moving defendant's recklessness may be inferred from the same evidence that supports an inference of their culpable participation in the fraud, *i.e.*, the execution of the trust deeds and promissory notes. Thus, summary judgment could not properly be granted on the ground of lack of scienter.

Plaintiffs also sought to hold the moving defendants liable as aiders and abettors of the securities fraud. An individual may be liable as an aider and abettor of a 10b-5 violation to the extent he "acted with knowledge or wanton and reckless disregard for the facts indicating fraud, and provided substantial assistance in commission of the fraud." *Little v. Valley National Bank of Arizona*, 650 F.2d 218, 222-23 (9th Cir. 1981). The district court predicated the aider and abettor part of its summary judgment decision on the absence of scienter on the part of the moving defendants. The evidence and arguments involved here are the same as those involved in our earlier discussion of scienter. Accordingly, the grant of summary judgment on plaintiffs' aider and abettor claim was not proper.

We do not mean to suggest that the evidence discussed in this memorandum is the only evidence that supports our conclusion that summary judgment was improper. We see no need, however, to engage in any more extensive analysis of the affidavits and declarations which were before the district court. The evidence we have analyzed herein is sufficient to require reversal of the district court's order.

By agreement of the parties at oral argument, the spouses of the principal moving defendants are to be dismissed from this case on remand. In ruling on the motion for summary

judgment, the district court apparently did not rely on, or consider, the activities of the various corporate entities and business concerns that are defendants in this action. Their role has not been addressed by the appellants or appellees and no one has argued that these defendants should be treated differently than the individual defendants. Accordingly, we reverse as to these defendants as well.

Finally, we note that at the time of the summary judgment motion appellants presented no evidence to rebut the contention of William O'Brien, fully supported by his affidavit, that he played only a peripheral role in these events and was in no way involved in or aware of any wrongdoing. Nor did appellants make any separate argument in their briefs or during their oral presentation before us as to this individual moving defendant. Consequently, we affirm the summary judgment as to O'Brien.

Affirmed in part, reversed in part for further proceedings consistent with this memorandum.

APPENDIX B.

Memorandum of Decision.

United States District Court, Central District of California.

Dorothea Nyberg, et al., Plaintiffs, vs. Thomas E. Johnston, et al., Defendants. No. CV 76-983-FW.

Filed: February 2, 1981.

In this action, Defendants Thomas and Shirley Johnston, Richard and Vivian Hallmark, William T. O'Brien, Robert and Lois Krause, Vista Del Verde, Inc., Vista Del Verde Corporation, Vista Del Verde Company and Condor International Corporation, brought on for hearing a motion for summary judgment. The Court has heretofore announced its decision granting the moving Defendants' motion. The following constitutes the memorandum of the Court setting forth the grounds for its decision.

Plaintiffs in this action seek damages for violations of the provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder. Plaintiffs made capital contributions to two limited partnerships, Park West Investment Company and Summerhill, Ltd., and made loans to a Utah corporation, Ski Park City West, Inc. (hereinafter "SPCW"), which investments were allegedly solicited and obtained by Defendants Steven Bauer and Roy Webley, who are not parties to the motion, by false representations and material omissions in violation of Section 10(b) and Rule 10b-5.

Plaintiffs oppose the motion of the moving Defendants on the theory that they were "controlling persons" of Defendants Bauer and Webley within the meaning of Section 20(a) of the Act, 15 U.S.C. § 78t(a), and further on the theory that moving Defendants were aiders and abettors of

Defendants Bauer and Webley in the violations of the securities laws.

The material undisputed facts, which are established on the record now before the Court, follow. Pursuant to an agreement entered into in 1972, Defendant Vista Del Verde Company, a California limited partnership, obtained an option to purchase a controlling interest in SPCW from Life Resources, Inc., a publicly traded Utah corporation which held approximately 80% of SPCW's outstanding common stock. SPCW operated a ski resort in Summit County, Utah, called Park City West. Defendant Vista Del Verde Company was engaged in the business of real estate development; its limited partner was Defendant William T. O'Brien, and its general partner was Vista Del Verde, Inc., a California corporation in which Defendants Richard Hallmark and Thomas Johnston were the sole directors. Defendants Hallmark and Johnston also owned and controlled two of the other corporate Defendants in this action, Vista Del Verde Corporation and Condor International Corporation.

In December of 1972, Defendants Hallmark, Johnston, Krause and O'Brien, became directors of SPCW, with Johnston, Hallmark and Krause, becoming officers in SPCW. Defendant Webley became employed by Vista Del Verde Company in an administrative capacity in January of 1973, as well as becoming a vice president of Vista Del Verde, Inc., and Vista Del Verde Corporation.

Defendant Steven Bauer owned and controlled Defendant Investment Controlled Research Corporation (hereinafter "ICR"), an investment advisory firm. All of the Plaintiffs in this action, with the exception of Margaret Ellis, were clients of Bauer and ICR prior to the time of the investments which are the subject of this action. Bauer was an acquaintance of Webley, and at some time prior to 1973, Webley

introduced Bauer to Defendants Richard Hallmark and Thomas Johnston.

In July of 1973, SPCW and Vista Verde Company entered into a joint venture agreement for the development and construction of condominium and commercial units on land owned by SPCW adjacent to the Park City West ski resort. Prior to this time, in the Spring of 1973, Defendant Bauer had meetings with Defendants Johnston, Hallmark and Webley, to discuss the possibility of Bauer providing funds for Vista Del Verde Company developments, including the Park City West venture, on a project-by-project basis, and Bauer agreed to do so.

According to the affidavits of Plaintiffs, Defendants Bauer and Webley solicited Plaintiffs' investments about and after June, 1973. In June of 1973, Park West Investment Company, a limited partnership, was formed with funds contributed by certain of the Plaintiffs herein, who were given limited partnership interests in the entity. The general partner of Park West Investment Company was Vista Del Verde Corporation, the partnership certificate being executed on behalf of the corporation by Defendant Webley, as vice president. In Ocotber of 1973, after further solicitations of Plaintiffs by Bauer and Webley, Summerhill, Ltd., a limited partnership, was formed with funds contributed by Plaintiffs Lewis and Margaret Marvin and Lorraine K. White. Such Plaintiffs received limited partnership interests, with the general partner being Vista Del Verde Corporation, the partnership certificate being executed on behalf of the corporation again by Defendant Webley, as vice president. Both of these partnerships, Summerhill, Ltd., and Park West Investment Company, provided financing to SPCW for the ski resort development.

The record before the Court does not disclose that Vista Del Verde Corporation authorized the execution of the Park

West Investment Company and Summerhill, Ltd., partnership certificates by Defendant Webley as vice president. Further, Defendants Hallmark and Johnston, the sole directors and shareholders of Vista Del Verde Corporation, stated, in substance, in their affidavits that Webley was not authorized to do so. Their affidavits are uncontroverted by Plaintiffs.

In June of 1974, Defendant Bauer entered into an agreement with SPCW, Bauer agreeing to provide funds for the ski resort development in return for a percentage of profits from the sale of the completed units. Defendant Savery Nash, who had become the president of SPCW in late 1973, signed the agreement on behalf of the corporation. Early that same month, June of 1974, following solicitations by Defendant Bauer, Plaintiff Dorothea Nyberg, as Executrix of the estate of her father, Lewis Marvin, loaned SPCW $106,000.00 in funds from the estate.

Thereafter, in August of 1974, Bauer entered into a second agreement to provide funds to SPCW ski resort project. In the latter part of September of 1974, after a meeting between Bauer and Plaintiffs Donald and Dorothea Nyberg, the Nybergs loaned an additional $65,000.00 of their own funds to SPCW, and in October of 1974, Plaintiff Dorothea Nyberg loaned an additional $63,100.00 of funds from the Nyman Trust to SPCW, after further solicitations by Defendant Bauer.

Plaintiffs' affidavits state that they made the foregoing investments on the basis of Defendants Bauer and Webley's fraudulent representations that their investments would be safe, profitable, and adequately secured by real property or deeds of trust. Plaintiffs' affidavits also state that Bauer and Webley omitted to tell Plaintiffs that they were partners, that Defendants Johnston and Hallmark owned and controlled Vista Del Verde Corporation, general partner of the

limited partnerships, and the identity of their principals in their fund raising endeavors. These and other allegedly fraudulent representations and material omissions form the basis of Plaintiffs' claims. (Pretrial Conference Order, Issues of Fact, ¶¶ 1-227, filed June 13, 1979.)

The record shows that at no time prior to or during the period of Plaintiffs' investments did any of the individual moving Defendants make any representations to Plaintiffs, or at any time, regarding the limited partnerships, Park West Investment Company and Summerhill, Ltd., or regarding loans by Plaintiffs to SPCW. (Pretrial Conference Order, Admitted Facts, ¶ 32.)

Plaintiffs seek to hold moving Defendants liable also as "control" persons or as aiders and abettors of Bauer and Webley's allegedly fraudulent activities.

Control Person Liability Under Section 20(a) of the Act.

Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a) provides:

> "Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the actual acts constituting the violation or cause of action."

In order to hold moving Defendants liable on this theory, Plaintiffs have to prove that (1) Bauer and Webley's representations and omissions constitute a violation of Section 10(b) and Rule 10b-5, and (2) that moving Defendants were controlling persons, within the meaning of Section 20(a), in respect of Bauer or Webley's acts or omissions which are in violation of the securities laws except that if moving

Defendants acted in good faith and did not directly or indirectly induce the actual acts of violation there is no liability. *Christoffel v. E. F. Hutton & Co.*, 588 F.2d 665, 667-68 (9th Cir. 1978). The law is now clear that in order for liability to be imposed under Section 10(b) and Rule 10b-5, a plaintiff must prove scienter — an intent on the part of defendant to deceive, manipulate or defraud. *Aaron v. S.E.C.*, ___ U.S. ___, 48 U.S.L.W. 4609, 4611 (June 2, 1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 N. 12 (1976). This rule applies regardless of the identity of the plaintiff or defendant. *Aaron, supra.*

The record in the instant case discloses that there was no scienter on the part of moving Defendants. While Plaintiffs contend that Defendants should be held for trial because they acted recklessly, there is nothing in the record to justify such an inference. By way of affidavits of Defendants Thomas Johnston, Richard Hallmark, William T. O'Brien and Robert Krause, the moving Defendants have presented evidence that they had limited dealings with Defendant Bauer; were unaware of the nature of Bauer's relationship with the Plaintiffs; were not aware of the nature of any representations made to Plaintiffs by Bauer and Webley; were not aware of Webley's role in assisting Bauer in soliciting the Plaintiffs' investments; and did not assist Bauer and Webley in making any of the alleged representations to Plaintiffs. Further, the affidavits of Defendants Hallmark and Johnston establish that Bauer was acting independently as a principal in providing funds for the Park City West construction project, and that, relying on Bauer's reputation as a reputable, established stockbroker, they assumed he would comply with all applicable laws and regulations in providing such funds.

Plaintiffs have submitted exhibits, affidavits and deposition testimony in opposition, but nothing submitted by

Plaintiffs controverts the evidence presented by moving Defendants that they exercised no control over Bauer and Webley in making misrepresentations and/or omissions, and that they had no reasonable grounds for believing that fraudulent or unlawful activities were taking place. Absent scienter, moving Defendants cannot be held liable as controlling persons under Section 10(b) and Rule 10b-5.

Liability as Aiders and Abettors.

Similarly, in order to hold moving Defendants liable as aiders and abettors of Bauer and Webley's Section 10(b) and Rule 10b-5 alleged violations, proof of scienter is also required. As discussed above, moving Defendants' uncontroverted affidavits and evidence established that they had no such scienter, and they cannot be held liable as aiders and abettors.

This is a proper case for summary judgment in favor of moving Defendants and their motion should be granted.

The foregoing constitutes the undisputed material facts and Conclusions of Law of the Court. Judgment will be entered in their favor but no judgment shall be entered until the Court has signed and caused to be filed its formal judgment.

Dated this 2nd day of February, 1981.

/s/ Francis C. Whelan
FRANCIS C. WHELAN
United States District Judge

Judgment in Favor of Defendants Thomas E. Johnston, Shirley L. Johnston, Richard S. Hallmark, Vivian Hallmark, William T. O'Brien, Vista Del Verde, Inc., Vista Del Verde Corporation, Condor International Corporation, Vista Del Verde Company, Robert J. Krause and Lois A. Krause.

United States District Court, Central District of California.

Dorothea Nyberg, et al., Plaintiffs, vs. Thomas E. Johnston, et al., Defendants. No. CV 76-983-FW.

Filed: February 2, 1981.

The motion of Defendants THOMAS E. JOHNSTON, SHIRLEY L. JOHNSTON, RICHARD S. HALLMARK, VIVIAN HALLMARK, WILLIAM T. O'BRIEN, VISTA DEL VERDE, INC., VISTA DEL VERDE CORPORATION, CONDOR INTERNATIONAL CORPORATION, VISTA DEL VERDE COMPANY, ROBERT J. KRAUSE and LOIS A. KRAUSE, for summary judgment in their favor dismissing the action was duly brought on to be heard, and the Court having caused to be filed its Memorandum of Decision granting said motion; and in accordance therewith. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiffs take nothing, and that this action is dismissed on the merits as to Defendants THOMAS E. JOHNSTON, SHIRLEY L. JOHNSTON, RICHARD S. HALLMARK, VIVIAN HALLMARK, WILLIAM T. O'BRIEN, VISTA DEL VERDE, INC., VISTA DEL VERDE CORPORATION, CONDOR INTERNATIONAL CORPORATION, VISTA DEL VERDE COMPANY,

ROBERT J. KRAUSE and LOIS A. KRAUSE, and that Defendants do have and recover their costs in the sum of $ _____ .

Dated this 2 day of February, 1981.

/s/ Francis C. Whelan
FRANCIS C. WHELAN
United States District Judge

APPENDIX C.

Relevant Statutory Provisions.

SECTION 10(b), Sec. Exch. Act of 1934 (15 U.S.C. § 78(j))

78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(a) To effect a short sale, or to use or employ any stoploss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SECTION 20, Sec. Exch. Act of 1934 (15 U.S.C. § 78(t))

78t. Liability of controlling persons

Joint and several liability; good faith defense

(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

Unlawful activity through or by means of any other person

(b) It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.

Hindering, delaying, or obstructing making or filing of any document, report, or information

(c) It shall be unlawful for any director or officer of, or any owner of any securities issued by, any issuer required to file any document, report, or information under this chapter or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information.

S.E.C. Rule 10b-5 (7 C.F.R. 240.10b-5 (1981))

Section 240.106-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Regulation C of General Rules and Regulations, Securities Act of 1933 (7 C.F.R. 230.405(f)(1981))

. . .

(f) Control. The term "control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.